

Cathy Michele LEISHMAN v. Duane Percy MacDONALD
CV2005000024

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2005
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IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

Cathy Michele LEISHMAN

Applicant

and

Duane Percy MacDONALD

Respondent

REASONS FOR DECISION
of the
HONOURABLE JUDGE Bernadette SCHMALTZ

Heard at: Yellowknife, NT
July 11 & 18, 2005

Counsel for the Applicant: No one attending on behalf of the Applicant

Counsel for the Respondent: Terry Nguyen
Peterson Stang Malakoe

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I. INTRODUCTION

[1] Cathy Leishman, the Applicant, has brought an Application to vary the amount of child support payable by Duane MacDonald, the Respondent, to an amount in accordance with the *Child Support Guidelines, N.W.T. Reg. 138-98* (the *Guidelines*). A Consent Order was filed in the Provincial Court of British Columbia on September 19th, 1997, requiring the Respondent to pay \$250.00 per month child support.

[2] The Applicant and the Respondent have one child together. Their son, now 14 years old, lives with the Applicant in Chetwynd, British Columbia. The Applicant and Respondent have been separated since at least September, 1997, and since September, 1997, the Respondent has been paying \$250.00 per month Child Support, pursuant to the Consent Order filed in the Provincial Court of British Columbia.

[3] On March 31st, 2005, the Applicant filed a Support Variation Application in this Court. The Applicant relies primarily on the usual costs of raising a child, e.g. clothing, sports, etc.; the child also has braces, and though the Applicant has dental coverage, the entire orthodontic costs are not covered. The child was 6 years old when the Consent Order was filed. The Applicant also relies on a change in the Respondent's circumstances, as the Respondent now has a

permanent job with BHP Mines; he is well paid, and has been working there for at least the last 4 years.

[4] The Respondent has filed an “Answer” to the Application, and claims that an order requiring him to pay child support in accordance with the *Guidelines* would result in an undue hardship to him and his current family. The Applicant was asked to provide a financial statement in ‘Form K’ and information with respect to any insurance policies that may cover expenses for the child. The Applicant provided this information.

[5] I have reviewed the information provided by both the Applicant and the Respondent, and considered the Brief filed by the Respondent in support of his claim of undue hardship. Counsel for the Respondent also made submissions on his behalf.

II. THE PARTIES’ SITUATIONS

[6] Both the Applicant and the Respondent are remarried.

[7] The Applicant lives with her current spouse, their two daughters, aged 10 and 12, and the Applicant and Respondent’s son, aged 14. The Applicant is employed by the Government of British Columbia and estimates her annual income for this year to be \$34,000.00; the Applicant’s spouse is estimated to earn approximately \$47,500.00 annually¹.

[8] The Respondent lives with his current spouse and their three children, aged 9, 7, and 2. The Respondent is employed by BHP Billiton Diamonds Inc. and estimates his annual employment income for this year to be \$108,000.00; he expects to incur a net loss of \$3,000.00 from the rental of his home in Fort Smith,

¹ This figure is based on information provided by the Applicant that her spouse earns \$22.82 per hour (\$22.82 x 40 hours/week x 52 weeks = \$47,465.60).

thereby estimating an annual net income of \$105,000.00. The Respondent's spouse is a nursing student and earns \$11,900.00 annually through Student Financial Assistance.

[9] According to the Applicant's 2004 Notice of Assessment, her total income for 2004 was \$31,203.00, and the tax payable was \$4,231.48. According to the Applicant's 2003 Notice of Assessment, her total income for 2003 was \$29,925.00, and the total tax payable was \$4,120.11. According to the Applicant's 2002 Notice of Assessment, her total income for 2002 was \$26,241.00, and the tax payable was \$3,413.67.

[10] The Applicant has estimated her income for 2005 to be \$34,000.00. From January 1st, 2005, to May 28th, 2005 (5 months), the Applicant's employment income was \$15,699.05. Projecting this amount to an annual salary would result in the Applicant's employment income for 2005 being \$37,677.72.

[11] According to the Respondent's 2004 Tax Return Summary, his total income for 2004 was \$116,341.67, and the tax payable was \$26,261.54. The Respondent's employment income from 2004, based on his T-4 slip for 2004, was \$108,008.33; the Respondent's RRSP income from 2004 was \$8,333.34, based on his 2004 Tax Return Summary. According to the Respondent's 2003 Notice of Assessment, his total income for 2003 was \$89,405.00, and the total tax payable was \$17,031.70. According to the Respondent's 2002 Notice of Assessment, his total income for 2002 was 103,000.00, and the tax payable was \$21,478.65. According to the Respondent's 2001 Notice of Assessment, his total income for 2001 was \$77,719.00, and the tax payable was \$14,130.17.

[12] The Respondent has estimated his employment income for 2005 to be \$108,000.00, and has estimated a rental income loss of \$3,000.00, for a "Total Annual Income" of \$105,000.00. From January 1st, 2005 to April 15th, 2005 (3.5 months), the Respondent's employment income was \$41,257.04. Projecting this

amount to an annual salary would result in the Respondent's employment income for 2005 being \$141,452.71. I recognize that the Respondent's income may fluctuate, as overtime amounts may vary, and it appears that his overtime pay for the first half of April, 2005 was fairly high. Projecting from his income for the first two months of 2005, results in an annual employment income of \$133,990.00; projecting using his income until the end of March, results in an annual income of \$130,467.00.

III. RESPONDENT'S CLAIM OF UNDUE HARDSHIP

[13] Pursuant to s. 12 of the *Guidelines*, the Respondent makes an undue hardship application, and asks this Court to reduce the amount of child support he is required to pay pursuant to the *Guidelines*. The hardship factors the Respondent relies upon are high access costs, his legal obligation to support his current spouse and their three children, and a further ground that is not enumerated in s. 12(2) of the *Guidelines*, the high debt incurred to support his current spouse and their three children.

A. High Access Costs

[14] The Respondent claims that he visits his son twice a year in Chetwynd, British Columbia. He claims that each of these trips costs him \$1,200.00. The Respondent has submitted many receipts from different periods in 2001 in support of this claim. I am told that he does not have copies of any later receipts available, due to various factors. Some receipts are illegible. Some receipts are for fuel bought in High Level, Alberta, on consecutive days, i.e. June 24th and June 25th, 2001, both purchases made at different locations in High Level. Several fuel receipts for June 1st, 2001 are included in the Respondent's materials. No information as to when the Respondent may have visited his son in 2001 has been provided. Further there are hotel receipts for December 1st,

2001, from the Stanford Inn in Grand Prairie, Alberta, and from December 2nd, 2001, from the Stardust Motor Inn in High Level, Alberta. I questioned as to whether the Respondent required three days to travel from Yellowknife to Chetwynd, having to spend two nights in a hotel, and was advised by counsel for the Respondent that the trip required stopping for one night. I do not know what the accommodation receipts from December, 2001, relate to, I do not know why there are two receipts or whether these receipts even relate to an access visit by the Respondent.

[15] I was told that the Respondent makes two trips per year to Chetwynd, B.C., taking his other three children, and spends a day or two in Chetwynd either visiting his son, or bringing his son back to Yellowknife for a visit. I am told that each of these trips costs approximately \$1,200.00. I do not know what the Applicant's position is with respect to this claim. I will proceed on the basis that the Respondent spends \$2,400.00 per year exercising access to his son in Chetwynd, B.C.

B. The Respondent's Financial Position

[16] The Respondent has a legal obligation to support his current family, and the Respondent further submits that he has incurred a high debt load to support his current family. Whereas the expenses the Respondent incurs from his legal obligation to support his current family are relevant to a claim of undue hardship, the high debt that the Respondent has incurred to support his current family is not a circumstance that is specifically set out in s. 12 of the *Guidelines*. I will proceed without deciding whether or not the debt incurred to support his current family is a relevant consideration in a claim of undue hardship.

[17] The Respondent claims an amount of \$300.00 per month to cover his debts other than his mortgage (see Respondent's Financial Statement, PART 3 – EXPENSES). The Respondent has a mortgage of just over \$79,000.00 on a

house he owns in Fort Smith. The Respondent claims a mortgage payment of \$1,084.00. It is not clear to me what the initial mortgage on the Respondent's house in Fort Smith was. The payment appears to be high for a \$79,000.00 mortgage. Perhaps the initial mortgage was for a larger amount, or the Respondent has a shorter than average amortization period, or a payment schedule resulting in larger reductions in the principle, all of which may be sound financial decisions, and make good sense. But if those decisions result in the Respondent not being able to meet his support obligations for his son, then the Respondent cannot rely on a claim of high debt load resulting in undue hardship, when the perceived hardship is a result of choices made by the Respondent that result in his monthly payments being higher than necessary.

[18] The Respondent's house in Fort Smith is rented out, and he has claimed a \$3,000.00 annual loss on that house. I do not see anywhere in the Respondent's financial information where he has claimed what the rental income is, but assuming for simplicity that the mortgage payments are \$13,008.00 per annum, and the rental income is \$10,008.00 per annum (resulting in the \$3,000.00 loss), then the Respondent must receive rental income in the amount of \$834.00 per month² from his house in Fort Smith.

[19] In his monthly expenses the Respondent has claimed both a mortgage payment of \$1,084.00 and a rental payment of \$505.00, but again, has not reflected what rental income he receives per month from the property in Fort Smith. Therefore, the Respondent's actual or net monthly expenses are not accurately reflected, but overstated.

² This is less than the Respondent actually receives in rental income per month from the house in Fort Smith. I was advised that the loss of \$3,000.00 is based on the difference between the rent received and the amount of the mortgage payment plus utilities. However, it is not necessary to determine the exact amount of rental income received, as even using this understated amount of income, I have determined that no hardship exists; any additional amount received by the Respondent in rental income would simply reinforce this finding.

[20] Further the Respondent claims a monthly “Compulsory Deduction” of \$1,059.58 (see Respondent’s Financial Statement, PART 3 – EXPENSES). From examination of the Respondent’s explanation of this compulsory deduction, i.e. “Supplemental Life Insurance Deduction, CSB, and Gasoline sale”, and the Respondent’s pay stubs as submitted, it is apparent that an amount of \$800.00 per month is for Canada Savings Bonds, which are not specifically reflected anywhere in the Respondent’s assets. I am told that the Respondent purchases the Canada Savings Bonds for his children. If the Respondent is purchasing an asset such as Canada Savings Bonds, and is purchasing this asset as a gift for his children, I do not accept that this is a compulsory deduction or expense that the Respondent is required to pay which could result in the reduction of his obligation to pay child support.

[21] The Respondent claims a monthly cost of \$248.98 for Employment Insurance – the maximum annual deduction for EI is \$772.20 per annum, or \$64.35 per month; therefore, the Respondent’s monthly expenses have been overstated with respect to this expense by \$184.63 per month. The Respondent claims a monthly cost of \$582.66 for Canada Pension Plan – the maximum annual deduction for CPP is \$1,831.50, or \$152.63 per month; therefore, the Respondent’s monthly expenses have been overstated with respect to this expense by \$430.03 per month.

[22] The Respondent’s total income in 2004 was \$116,341.67; on that the total tax payable was \$26,261.54. This year he estimates his total income will be \$105,000.00, \$11,341.67 less than in 2004. The Respondent claims a monthly tax expense of \$3,776.91 or \$45,322.92 per year. This would be \$19,061.38 more than he paid in taxes last year. I cannot accept that the Respondent’s tax payable on a net income of \$105,000.00 will be more this year, let alone 73% more, than it was last year on an income of \$116,341.67³. If the Respondent has

³ Whereas counsel indicates that the numbers are taken from the Respondent’s pay-stubs, one cannot, and should not, ignore the fact that the Respondent received a tax refund of \$6,807.09 for

an income of \$130,000.00 this year, than his monthly tax expense will be approximately \$2,445.38⁴; therefore, the Respondent's monthly tax expense has been overstated by \$1,331.53 per month.

[23] The Respondent claims monthly expenses of \$12,052.13. I find that these expenses have been overstated by at least \$3,580.20⁵.

[24] The Respondent's current spouse earns \$11,900.00 per annum in Student Financial Assistance, and his financial statement indicates that she pays 10% to 15% of the monthly household expenses. This contribution is not reflected in the Respondent's list of expenses.

[25] Therefore I find that the Respondent's total monthly expenses are, at most, \$8,471.93. If the Respondent's spouse contributes 15% to the household expenses, this would be a contribution of \$832.50 per month, reducing the Respondent's actual monthly expenses to \$7,639.43. The Respondent's minimum monthly income is \$8,750.00 if his figure of an estimated annual income of \$105,000.00 is accepted. I find this figure to be extremely conservative, to the point of being understated. I find that a more realistic figure to use for the Respondent's annual employment income based on the first 3.5 months of 2005 is \$130,000.00. The \$3,000.00 loss that the Respondent may incur on his rental property should not be taken into account to reduce his employment income, as a monthly expense of \$250.00 to supplement the rental

the 2004 taxation year, of \$8,033.80 for the 2003 taxation year, of \$5,959.36 for the 2002 taxation year, and of \$9,850.03 for the 2001 taxation year. Bearing the refunds in mind, along with the actual tax paid for the previous years, to state that the Respondent's pay-stubs are an actual reflection of his monthly tax expense is ignoring the actual and obvious facts.

⁴ $\$26,261.54 \times \$130,000.00 / \$116,341.67 = \$29,344.00$, or \$2,445.38 per month

⁵ This figure reflects the following over-statements of Monthly expenses: Mortgage Payment should be reduced by \$834.00 to reflect rental income; Income Tax expense should be reduced by \$1,331.53; Employment Insurance expense should be reduced by \$184.63; Canada Pension Plan expense should be reduced by \$430.03; Compulsory Deductions should be reduced by \$800.00, as the purchase of Canada Savings Bonds cannot properly be considered a compulsory deduction or monthly expense.

property has been allowed. The Respondent's monthly income based on an annual income of \$130,000.00 is \$10,833.33.

C. Liabilities & Assets

[26] The Respondent has a mortgage on his home in Fort Smith of \$79,262.00; this home is rented out. The total of his personal loans and liabilities is \$28,265.00. The Respondent has \$71,000.00 equity in his home in Fort Smith; he has 6 vehicles, including two snowmobiles. The total value of his vehicles is \$37,000.00, and he has investments valued at over \$31,000.00.

[27] In his financial information provided in Form K, the Respondent lists his chequing account as valued at \$100.00; the print-out from the bank states that he has a balance of \$7,872.13 in his chequing account. Counsel for the Respondent states that this amount (approximately \$7,700.00) was used to pay down the Respondent's personal loans. If this is the case, then the Respondent's liabilities should be stated as \$20,492.00 rather than \$28,265.00. (A figure also obtained from a printout from the Bank). The Respondent, as conceded by his counsel, has either understated his assets by at least \$7,700.00, or overstated his liabilities by \$7,700.00.

IV. THE APPLICABLE LAW

[28] Section 4(1) of the *Guidelines* states:

4(1) Unless these guidelines provide otherwise, the amount of support for a child who is a minor or for children who are minors is

- (a) the amount set out in the applicable table, according to the number of minor children to whom the order will relate and the income of the parent from whom support is sought; and
- (b) the amount, if any, determined under section 9.

[29] Section 9 of the *Guidelines* sets out the circumstances in which the Court may include in a child support order a provision to cover special or extraordinary expenses. Section 9(1)(b) lists medical and dental insurance premiums attributable to the child, and 9(1)(c) lists orthodontic treatment when such treatment exceeds insurance reimbursement by at least \$100.00 annually.

[30] The *Federal Child Support Amounts: Simplified Tables Northwest Territories* (the applicable table) sets out child support of \$1,069.00 per month for one child, base on an annual income of \$130,000.00.

[31] As stated earlier, the Respondent applies to this Court to order an amount of support different from that required by the Guidelines. The Respondent submits that if he is ordered to pay the amount set out in the *Guidelines* he will suffer undue hardship. Section 12(2) of the *Guidelines* sets out circumstances that may cause a parent to suffer undue hardship. Undue hardship may result from an unusually high level of debt, reasonably incurred to either support the family before the family separated, or to earn a living (s. 12(2)(a)), or if a parent has unusually high costs or expenses in exercising access to the child (s. 12(2)(b)).

[32] In order to find that the Respondent would suffer undue hardship if he were ordered to pay support in accordance with the Guidelines, the Respondent must prove specific facts to establish the undue hardship. If undue hardship is established, then the Respondent must show that his household would enjoy a lower standard of living than the Applicant's household if the child support were not reduced.

[33] As the Alberta Court of Appeal said in *Hanmore*:

The objectives of the Guidelines are set out in s. 1. The primary objectives are "to establish a fair standard of support for children that will ensure that they continue to benefit from the financial means of both spouses after separation", and "to ensure consistent treatment of spouses

and children who are in similar circumstances". Such objectives will be defeated if the Courts adopt a broad definition of "undue hardship" or if such applications become the norm rather than applying to exceptional circumstances. That has been the consistent message of the Courts since the Guidelines came into force. (*Hanmore v. Hanmore*, 2000 ABCA 57, Tab 3)

[34] The threshold for establishing "undue hardship" is a high one. The term means hardship that is exceptional, excessive, or disproportionate in the circumstances. The threshold is not met by the Respondent showing some hardship. The question is whether it is undue. (see: *Campbell v. Chappel*, [2002] N.W.T.J. No. 96 at para. 18)

[35] From reviewing the information provided by the Respondent, I cannot find that the Respondent would suffer any hardship if he were ordered to pay child support in accordance with his income. Even if child support in accordance with the Guidelines, and the cost of exercising access to his son of \$200.00 per month, are factored into his expenses, the Respondent should still be able to meet his monthly expenses and obligations.

[36] Further, even if I had found that the Respondent would suffer undue hardship, that would not automatically result in a reduction in the amount of child support the Respondent would be required to pay. Section 12(3) provides that the application for a variance in the amount of child support to be ordered must be denied if I am of the opinion that the Respondent's household would, after determining the amount of support to be paid in accordance with the guidelines, have a higher standard of living than the Applicant's household.

[37] The incomes and circumstances of the two households are set out above. Both households have two adults and three children; the Respondent's children are somewhat younger, but other than that there are no significant differences between the circumstances of the households or the children. The total annual income of the Applicant's household is between \$81,000.00 and \$85,000.00; the

total annual income of the Respondent's household is approximately \$141,900.00. Considering the similar circumstances of the two households, and without doing any complicated calculations, it would seem obvious to me that the standard of living of the Respondent's household would be higher than the Applicant's. Even after considering the child support payable to the Applicant, i.e. adding that amount to the Applicant's household income and deducting that amount from the Respondent's household income, the Respondent will still have a significantly higher standard of living.

[38] In comparing the standards of living of the two households, the Respondent has submitted different calculations based on Schedule B of the Guidelines. The difficulty I have with the Respondent's calculations is that the Respondent suggests that his cost of raising three children is \$21,732.00 per annum, and the Applicant's cost of raising three children is \$7,092.00 per annum. The Respondent arrived at these figures based on the respective incomes of the Respondent and the Applicant, and the hypothetical amount of child support each of them would be required to pay, based on their incomes. With respect this logic is flawed in that it attributes a lower cost of raising children to the Applicant, based on her lower income and, thereby, assuming she would have a lower standard of living in order to make a calculation of her standard of living. Being that the Respondent and the Applicant have comparatively similar family or household situations, there is no need to consider the cost of raising three children, or if such is to be considered in order to compare their respective standards of living, it should be the same amount considered for both households. In this way the comparison will result in a true comparison of the standards of living for each household. If the calculations are done in an impartial way, i.e. having the cost of raising three children the same for both households, it is clear that the Respondent's household will have a significantly higher standard of living than the Applicant. And this is the case whether or not the debt load is considered for each household.

[39] I find that ordering the Respondent to pay child support in accordance with the *Guidelines* would not result in any hardship to the Respondent. Further, I find that even after paying child support to the Applicant, the Respondent's household will still enjoy a higher standard of living.

V. CONCLUSION ON SUPPORT VARIATION

[40] The Respondent is ordered to pay child support to the Applicant in the amount of \$1,069.00 per month commencing April 1st, 2005.

[41] Further the Respondent shall pay 78% of the cost of the child's orthodontic work that is not covered by insurance⁶. If there is a cost to the Applicant or the Applicant's spouse for the insurance that covers the child's orthodontic work, the respondent shall pay 15.5% of the cost of the insurance premiums⁷.

VI. RETROACTIVE SUPPORT

[42] I have considered whether retroactive support should be ordered. Neither party have addressed this issue, nor filed sufficient or specific material or information with respect to this issue. The Applicant has requested a variation in support to an amount in line with the *Guidelines*. Pursuant to s. 32(2) of the *Interjurisdictional Support Orders Act*, the Court can make a retroactive support variation order. The Respondent has peripherally touched on this issue by claiming that in the past, he has provided his credit card number to the Applicant for expenses related to the child.

⁶ The Respondent's Income divided by the total of the Respondent's plus the Applicant's Income, i.e. $\$130,000.00 / \$130,000.00 + \$37,500.00 = .776$

⁷ Assuming that the insurance coverage is for the 5 members of the Applicant's family, and the child being one of the members, the Respondent is responsible for $.776 \times 1/5 = 15.5\%$

[43] I find that I do not have enough information to either make a retroactive support order, nor to deny an application for such an order. Therefore, I am going to ask each party to file further material and information specific to the issue of retroactive support. The materials, information, and any case law that either party wishes to rely on are to be filed by September 26th, 2005, and the matter will be heard on October 31st, 2005 at 9:30 a.m.

Bernadette Schmaltz
J.T.C.

Dated this 19th day of July, 2005, at
the City of Yellowknife, Northwest Territories

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